



**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1415 OF 2010**

**JAMES MUASYA KITONYI..... CLAIMANT**

**VERSUS**

**M/S KAMWAI LIMITED.....RESPONDENT**

Mr. Burugu for the Claimant

Mr. Rakoro for the Respondent

**JUDGMENT**

1. The Claimant James Muasya Kitonyi was employed as a petrol pump attendant by the Respondent on 13<sup>th</sup> February, 1996 at Kshs.6,000 per month. He was promoted to supervisor and his salary increased to Kshs.7,000.00. He worked continuously until 3<sup>rd</sup> May, 2010, when his employment was verbally terminated by the Respondent.
2. The Claimant reported to work at 6.30 a.m. and clocked off at 8.30 pm. These were twelve (12) hours daily. The employer provided transport to his home. He was not paid overtime for fourteen (14) years.
3. At the time he left, his monthly salary was Kshs.8,500.00. The Claimant states that he was not given notice nor paid in lieu thereof. That he was also not paid severance pay upon termination. He was also not paid salary for thirteen days worked in the month of May 2010. He was registered with the National Social Security Fund (NSSF) until he left employment.
4. He also told the Court that in terms of the General Wage Order, he ought to have been paid as a supervisor at the rate of Kshs.15,017.00 per month.
5. He also stated that the termination of his employment was unlawful and unfair because he was not given any reason for the termination nor was there notice and due process in terminating his services.
6. The Claimant seeks payment of terminal benefits and compensation as set out in paragraphs 3, 4, 5 and 6 of the Memorandum of Claim dated 12<sup>th</sup> November, 2010, and filed on 15<sup>th</sup> November, 2010.
7. **Memorandum of Response**

The Respondent filed on 8<sup>th</sup> February, 2011, a Memorandum of Response in which;

- a. it admits that the Claimant was employed as a pump attendant and was also a supervisor at the petrol station;
- b. that the salary paid to the Claimant was agreed upon by the parties and therefore the issue of underpayments does not arise;
- c. that the Claimant absconded from duty and got another job as a driver at the Respondent's neighbouring business, Gratum Babz Service Limited on 17<sup>th</sup> May, 2010;
- d. that the Claimant reported to work at 8 a.m. and left at 5 p.m. and therefore he is not entitled to overtime as claimed or at all;
- e. that the Claimant also got one (1) off day per week in terms of the law; and
- f. that the Claimant was registered with NSSF and NHIF and therefore is not entitled to any service gratuity.

8. The Respondent attached a demand letter dated 2<sup>nd</sup> December 2010 written by A.O. Jacob Keya, Labour Consultants which reflects demands completely at variance with those made in the Statement of Claim.

### 9. **Testimony**

The Claimant testified under oath in support of the particulars of Claim. He denied he had absconded from work for a better job stating that he was employed by the neighbour once his employment was terminated by the Respondent. He denied he had taken a loan of Kshs.15,000.00 from the Respondent.

10. RW1 was Zipporah Wairimu Kimani, the Managing Director of the Respondent. She told the Court that the Claimant worked from 8 a.m. to 5 p.m. That he worked six days a week and got two (2) off days in a month. He was also given thirty (30) days leave a year. She produced copies of the master roll for the period 2006-2010.

11. RW1 testified that on 11<sup>th</sup> April, 2010, while the Claimant was working as a supervisor, a customer's petrol engine car was filled with Diesel fuel. The Claimant did not report the incident until the customer complained to RW1.

12. The Claimant was not cooperative in identifying the attendant who had made this mistake. That it was not the first time he was un-cooperative whenever there was an issue.

13. RW1 demoted him to a petrol attendant. The Claimant absconded from work the same day.

14. RW1 got the letter of demand from the Claimant dated 24<sup>th</sup> July, 2010, in which letter he did not state his employment was terminated.

15. RW1 replied to the letter on 7<sup>th</sup> August, 2010, stating that the Claimant had absconded from duty without notice and demanded that he pays the Respondent in lieu of notice and also refund Kshs.19,000.00 advanced to him by the Respondent. The Claimant did not respond to the letter.

16. RW1 later saw the Claimant working at a neighbouring business. The new employer had also called RW1 asking for a reference of the Claimant.

17. RW1 admits that the Claimant owed:

- a. Eleven (11) days salary for days worked in April, 2010

18. RW1 denied all the other claims because the Claimant was not underpaid; he deserted work; he was registered with NSSF and NHIF and in fact, he owed the Respondent Kshs.27,500 comprising of Kshs.19,000.00 loan advance and payment in lieu of notice. The Respondent counterclaims this amount.

19. RW I added that the Claimant was not given a certificate of service since he had absconded. RW1 admits the Claimant earned Kshs.8,500.00 per month. That the Claimant wasn't given any written contract of employment.

20. RW1 withstood well very close cross examination by the counsel for the Claimant. Her testimony was candid and consistent and she came across as a credible witness. The Court cannot say the same about the Claimant.

21. The Court is not satisfied that the Claimant has proved on a balance of probability that his employment was terminated by the Respondent. The Court believes RW1 that the Claimant absconded work following a demotion from the position of supervisor to an attendant and sought employment from a neighbouring business.

22. The Claim for notice pay by the Claimant is therefore dismissed. Similarly, it being common cause that the Claimant was registered with NSSF and the employer had made all contributions in respect thereof, dismisses the Claim for payment of severance pay.

23. The Court is also not satisfied that the Claimant has shown that he was owed any overtime as claimed or at all by the Respondent. For the entire period he worked for the Respondent as a Petrol attendant and station supervisor, he had not made any demand for such payment.

23. The Court believes RW1 that the Claimant reported to work at 8 a.m. and clocked-off at 5 p.m. and was therefore not entitled to payment of overtime.

24. The only prayers by the Claimant which have been sufficiently proved are;

- a. Payment of underpayment for period 1<sup>st</sup> May, 2006, to 30<sup>th</sup> April 2009, in the sum of Kshs. 110,484.00 and between 1<sup>st</sup> May, 2009, to 30<sup>th</sup> April, 2010, in the sum of Kshs. 61,284.00.

The underpayments have been sufficiently demonstrated in terms of the Regulation of Wages (General Amendment) Order 2006 being Legal Notice No. 38 of 2006.

The Regulation of Wages (General Amendment) Order, 2009 being legal Notice No. 70 and Legal Notice No. 98 being the Regulation of Wages (General) (Amendment) Order 2010.

25. The Court therefore awards the Claimant a sum of Kshs. 172,308.00.

26. **Counterclaim**

The Respondent has proved on a balance of probabilities that the Claimant absconded work without giving notice. The Claimant is therefore found liable to pay to the Respondent, one month's salary in lieu of notice.

27. Furthermore, the Court is satisfied that the Claimant owed Kshs. 19,000.00 advanced to him by the Respondent at the time he absconded from work.

28. The Court awards the Respondent Kshs.27,500.00. This amount is to be off-set against the award made to the Claimant.

29. In the final analysis the Claimant is awarded:

- i. Kshs.7,509.00 arrear salary;
- ii. Kshs.172,308.00 underpayment, less Kshs.27,500.00 awarded to the Respondent.

Award payable to the Claimant is Kshs.152,317.00.

30. The Respondent is to provide the Claimant with a certificate of service within fourteen (14) days of this judgment.

No award for costs and interest is made in this matter considering the Claimant absconded from work and the Respondent has been partly successful in the suit.

*Dated and Delivered at Nairobi this 5<sup>th</sup> day of December, 2014*

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**